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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

CARL NIEPERT,
an Individual and as Executor of the Estate of
Dorothy Niepert, Deceased,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 1, 1957, which affirmed the judgment of the District Court for the Northern District of Ohio, Eastern Division in the above entitled case.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, Eastern Division (App. 14) are not reported, and said Court's Memorandum on Motion for New Trial or Reversal of Decree and Assessment of Damages (App. 18) is also unreported. The Opinion and order of the Court of Appeals (App. 19-25) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Was the Court of Appeals correct in ruling that in a death action brought in a federal Admiralty Court involving negligently-created hazards to navigation, which resulted in a collision and death on navigable waters of Lake Erie, the substantive common law of Ohio supersedes and prevails over the federal admiralty substantive law in determining the effect of contributory negligence?

STATUTE INVOLVED.

Title 28 U. S. C. 1333 provides in pertinent part:

"Section 1333. Admiralty, maritime and prize cases.

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT.

This case was brought in federal court under the federal admiralty jurisdiction and is presented on an agreed statement of facts. The parties by stipulation (R. 17a) concede that the Findings of Fact of the Trial Court (App. 14) are complete and accurate. Said findings may be briefly stated as follows:

This action was brought in a federal Admiralty Court, wherein the libellant sought to recover for the death of his wife which was caused by respondent's negligence on the navigable waters of Lake Erie. As a second cause of action, libellant sought and was awarded recovery, on a division of damages basis, for the destruction of his boat which resulted from the same wrongful acts and the same event which caused the death of his wife. There is no complaint of error in the Court's ruling on the second cause of action. At issue here is the denial of recovery on the first cause of action.

On October 3, 1953, about 10:00 o'clock at night, a 28-foot motor boat, owned and operated by libellant, collided with respondent's pier which was without prescribed lighting and which extended 1200 to 1300 feet from the shore near Eastlake, Ohio, into the navigable waters of Lake Erie.

Said collision resulted in the death of libellant's wife, Dorothy Niepert, and the sinking and complete loss and destruction of libellant's said boat.

The Admiralty Trial Court found, and it is therefore conceded that the pier constituted an obstruction and hazard to navigation, especially to small craft such as libellant's boat. The Court further found that the light provided on said pier, contrary to regulations, was not visible from all essential directions and was inadequate.

This failure to light the pier was found to be a breach of duty which proximately brought about the death of libellant's wife and the destruction of libellant's boat.

It was also found that this being a very dark night, libellant, although he was aware of the existence of the pier, was unable to see it or the lights of the pier until it was too late to avoid the collision. The Trial Court found that libellant's conduct was also negligent for it was found that although libellant reduced his speed in the area where the unseen pier was located, he did not reduce it a sufficient amount.

The Trial Court, having found that the motor boat was worth $5,000.00, applied the Admiralty Rule of division of damages and ruled that libellant recover $2,500.00 in damages for loss of his boat (App. 16, 17). However, libellant's right to recover for the death of his wife which arose out of the exact same facts, and the exact same event, was denied. The Trial Court ruled that it would not apply the Admiralty Rule of mitigation of damages, but would instead apply the Ohio substantive common law rule which bars recovery by one who has been contributorily negligent (App. 17).

Libellant appealed because of the Court's error in applying Ohio substantive law in an admiralty proceeding, and the Court of Appeals affirmed the trial court.

REASONS FOR GRANTING THE WRIT.

The very substantial grounds supporting the granting of this writ are underscored by the fact that several of the considerations favoring the granting of writs which are stated in Rule 19 Paragraph 1(b) of the Revised Rules of The Supreme Court of the United States are present in this case.

The Court of Appeals "has rendered a decision in conflict with the decision of another court of appeals on the same matter." The Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court." The Court of Appeals "has decided a federal question in a way in conflict with applicable decisions of this court."

(a) Circuits Are in Conflict on This Question.

This ruling of the Court of Appeals for the Sixth Circuit is in direct conflict with the position take by the First Circuit on the same question.

The Sixth Circuit in this case ruled that when a federal court of admiralty borrows a state wrongful death statute to supply a remedy for a maritime tort, the federal admiralty court must act as though it were merely another state tribunal and apply all of the substantive common law of the state, that is, even law of the state not included in the wrongful death statute. In this case such a holding meant that Ohio's rule causing contributory negligence to be a complete bar to recovery was applied in lieu of the clear-cut rule of admiralty that contributory negligence merely serves to mitigate damages.

The Court of Appeals for the First Circuit, however, in *O'Leary vs. U. S. Lines Co.*, 215 F. 2d 708 (1954), Cert. denied, 348 U. S. 939 (1955), firmly asserted the opposite

position. In that opinion by Judge Woodbury which was concurred in by Chief Judge Magruder, it was stated at page 711:

> "Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc., v. Hawn supra, that the maritime law determined the respective rights of the parties in the event of personal injury short of death, but the state law determined their rights in the event of injuries resulting in the ultimate consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S. S. Co. * * * the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important."

(b) An Important Question of Federal Law Never Settled by the U. S. Supreme Court is Involved.

In an action in a federal Admiralty court in which the remedy of a state's wrongful death statute is borrowed, is the federal admiralty court required to abandon the admiralty rule which states that contributory negligence mitigates damages and in its place employ the substantive common law rule of the state, which makes contributory negligence a bar to recovery?

This question on contributory negligence has never been decided by The Supreme Court of the United States.

The importance of this question becomes apparent upon viewing a map showing the coast lines of this nation, and gains further importance when it is also remembered that the St. Lawrence seaway will sharply increase the ship traffic at ports in states bordering on the Great Lakes.[1] This question, of course, is not limited to a ruling on the issue of contributory negligence. It involves every rule of substantive law which may arise in these death cases, for this ruling will determine whether the applicable substantive law shall be state or federal.

This case presents itself in its fullest importance when it is realized that it poses the problem of the functioning and interrelationships of different judicial systems within a federal plan of government. More specifically, this case raises a question of the interpretation of Title 28 U. S. C. Section 1333 which reads in pertinent part as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of The States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other *remedies* to which they are otherwise entitled." (Emphasis supplied).

The parties to this litigation do not dispute the fact that by virtue of this legislation the courts have long recognized that a state's wrongful death statute may be borrowed in a federal admiralty proceeding to supply a remedy when a maritime tort is committed within the territorial waters of a state and said tort causes death.

The conflict arises in determining how much is borrowed. Petitioner contends that it is solely the remedy and

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[1] See *U. S. News & World Report* of June 1, 1956, at page 62, wherein it is indicated that St. Lawrence River shipping will increase from a present 10 million tons a year to 36.5 million tons in 1959 and to 52 million tons by 1965.

the cases support this contention. Respondent's contention, which the court of appeals supported, is that the so-called saving of remedies statute permits the wholesale substitution of state substantive law for admiralty law in a proceeding in a court of admiralty.

The saving of remedies statute was amended in 1917 (40 Stat. 395), to add a provision saving more than remedies, but also saving to claimants "the *rights* and remedies under the workmen's compensation law of any state." (Emphasis supplied.)

This amendment was declared unconstitutional in *Knickerbocker Ice Company vs. Stewart*, 253 U. S. 149 (1920), wherein the Court stated:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law."

This case was presented to the court of appeals, but was not discussed in its opinion, nor did the court of appeals address itself to the following point made by your Petitioner. Respondent contends that this is purely a state matter and a state right, that only state substantive law is applicable and that we do not look to federal admiralty law in this matter. If this contention is accurate, as the court of appeals held, by what authority did the federal admiralty court take jurisdiction of this matter? Diversity of citizenship was not present, and if this was not a federal matter, as the court of appeals held, there was no basis for jurisdiction. Yet federal courts have been hearing these matters ever since *The Harrisburg*, 119 U. S. 199 (1886). They have been hearing these cases for the obvious reason that

this is a federal question, a question of federal admiralty law and not a purely local state question as respondent and the court of appeals assert.

(c) A Federal Question Has Been Decided in Conflict With Applicable Decisions of This Court.

It has been noted above that this Court has never directly decided the question of what law determines the effect of contributory negligence in an action in a federal admiralty court in which a state's wrongful death remedy is borrowed.

While this question has never been decided directly by this Court, this Court has given significant indication of how it would decide this question. It is respectfully submitted that the court of appeals decision in this case is in conflict with these applicable decisions.

It has already been pointed out that in *Knickerbocker Ice Company vs. Stewart, supra,* this Court took the drastic step of declaring unconstitutional a change in the so-called saving of remedies statute which would have allowed the granting of new rights as opposed to mere remedies.

Further, this Court in *Pope & Talbot Inc. vs. Hawn, et al.*, 346 U. S. 406 (1953), had the issue before it of whether a state or an admiralty rule on contributory negligence should be applied in an admiralty proceeding. This Court held that it is the admiralty rule which is to be used. The fact that *Pope & Talbot Inc. vs. Hawn et al., supra,* was not a case in which a state's wrongful death remedy was borrowed does not lessen the force of that opinion for the Court stated at page 409:

> "Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling."

In *Southern Pacific Co. vs. Jenson*, 244 U. S. 205 (1916), this Court made the following statement:

> "And plainly we think no such state legislation is valid if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

This leads directly to the question of whether or not the admiralty rule that contributory negligence only mitigates damages is a characteristic feature of the general maritime law. That it is such a characteristic feature was made clear as early as 1890 in *The Max Morris*, 137 U. S. 1 (1890). Any doubt that may have existed on this point was completely eliminated in *Pope & Talbot Inc. vs. Hawn et al., supra*, wherein this Court used the following strong language at pages 408 and 409:

> "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery *is completely incompatible with modern admiralty policy and practice.*" (Emphasis supplied.)

Respondent herein attempts to avoid the clear-cut dictates of these cases by claiming they are not death cases. The point remains, however that they establish a rule for admiralty and the case now before this Court is a case which arose out of the maritime tort of negligently creating hazards to navigation and is a case which was brought and heard in a federal admiralty court.

The recent case of *Cox vs. Roth*, 348 U. S. 207 (1955), is also in point. This case involved the right to sue the estate of a deceased tort-feasor in admiralty. Direct analogies to the right to sue for wrongful death can and were made by this Court. The Court of Appeals in *Roth vs. Cox, et al.*, 210 F. 2d 76 (1954), ruled that there was no right to sue the estate, but that by use of 28 U. S. C. 1333 the

state remedy allowing suits against an estate could be employed.

This Court affirmed the court of appeals. However, it held that there was no necessity to borrow a state-remedy as it felt there already existed in that admiralty action a right to sue an estate of a deceased tort-feasor. This Court went on to discuss the problem of wrongful death actions as well as actions against deceased tort-feasors.

In this unanimous decision The Supreme Court cited with approval the remarks of Roscoe Pound on death statutes in 13 *NACCA Law Journal* 188-189 (May 1954). Dean Pound stated in said comment:

> "Lord Campbell's Act is now well over a century old and has been adopted in every common law jurisdiction. To think of recovery for wrongful causing of death as something exceptional not to be treated as part of the general law but to be provided for specifically as to the application of every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law."

This Court, having allowed a claim against a deceased tort feasor in admiralty, and having approved the language cited above, should now declare that a wrongful death action may be allowed in admiralty without resort to state remedies. However, it should be clear that it is not necessary for the Court to go that far to sustain Petitioner's position. Under the present system of borrowing the state's wrongful death remedy, there are serious questions as to the proper choice of law for the Court to rule on.

A final point should be clarified in this case. The respondent has argued and the court of appeals by its opinion accepted the argument that the so-called Death on The High Seas Act, 46 U. S. C. 761 is dispositive of the issue

here involved. This act provides for an action for wrongful death which occurs on the high seas, but is not applicable to deaths occurring within the territorial waters of a state. In the event of death on the territorial waters of a state, it leaves the claimants to the remedy of borrowing the state wrongful death statute. It should be obvious that this act is neither dispositive nor helpful in resolving the issue before the Court. It does little more than restate the question. It asserts that a state's remedy shall apply, but it leaves unanswered the following question: When a state's remedy is applied in an admiralty court proceeding, does, or even can, the state's substantive common law supplant the characteristic features of the law of admiralty?

CONCLUSION.

The anomalous result which emerges from the Court of Appeals decision emphasizes the weaknesses in the erroneous ruling that has been made. Here, the respondent would have been liable if it slightly injured Petitioner's decedent, but escapes all liability if the injury caused death. The result is further demonstrated to be inconsistent and illogical by the fact that Petitioner has been allowed recovery for the loss of his boat, but has been denied recovery for the loss of his wife who met her death at the same time as result of the same factual event.

For the reasons that there is conflict in the circuits on the question here involved, that an important federal question is here involved which has never been decided by this Court, and for the reason that the decision made in this matter is in conflict with such decisions of this Court which are applicable, it is respectfully requested that this petition for a writ of certiorari be granted.

LOUIS S. BELKIN,
FRED D. SHAPIRO,
526 Standard Building,
Cleveland 13, Ohio,
Proctors for Petitioner.

SINDELL, SINDELL, BOURNE & DISBRO,
526 Standard Bldg., Cleveland 13, Ohio,
Of Counsel for Petitioner.

April, 1957.

APPENDIX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

(Filed February 17, 1956.)

JONES, J.:

This cause came on for trial and the Court, having heard the evidence and arguments of counsel, finds the following facts and states the following conclusions of law, pursuant to the requirements of Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases:

FINDINGS OF FACT.

1. On October 3, 1953, at about 10:00 o'clock p.m., a 28-foot Gar Wood type motor boat, owned and operated by libellant, collided with a nearly completed pier which was being built for respondent in the navigable waters of Lake Erie near Eastlake, Ohio, which collision resulted in the death of libellant's wife, Dorothy Niepert, and the sinking and complete loss and destruction of libellant's said boat.

2. The pier extended from the shore into the waters of Lake Erie a distance of 1200 to 1300 feet, and projected from six to seven feet above the surface of said waters, thereby constituting an obstruction and hazard to navigation, especially to small craft such as libellant's boat.

3. At the time of the collision the pier was nearly completed. The construction was being done for respondent by the Great Lakes Dredge & Dock Company. Permanent lighting for the pier was included in the construction plans and had been approved by the United States Coast Guard, but at the time the collision occurred its installation had not been completed.

4. At the time of the collision the lighting on the pier consisted of a temporary light of a type supplied and approved by the contractor, located on a pole at the end of the pier. While the United States Coast Guard did not recommend any certain type of light for temporary lighting, it did require that such a light be visible from all essential horizons. The light provided was not visible from all essential horizons.

5. Under all of the circumstances the temporary lighting provided on the pier was not adequate. The failure of the respondent adequately to light the pier, while neither wilful, reckless, nor wanton, did constitute a breach of duty, or fault, upon the part of respondent which proximately brought about the accident and the consequent death of the libellant's wife.

6. On the night of the collision the Lake was calm, but the night was very dark. There was no mist, fog or other similar obstruction to visibility.

7. Prior to the time of the collision libellant knew of the existence and approximate location of the pier. He had made four trips past the pier before the day of the collision, at least once at night and three times in the daytime. He had passed by the pier twice in the afternoon of the day of the accident. Libellant also knew that respondent maintained a power plant on the shore from which the pier jutted out into the water.

8. Libellant was an experienced amateur lake boatsman, with 25 years' experience in operating small boats on Lake Erie. As he approached the vicinity of the pier libellant and Wick, a passenger in the boat, saw the lights of respondent's power plant on the shore, knew they were in the vicinity of the pier, and discussed its probable location. They also discussed the lights from a barge which

Wick had on all previous occasions seen east of the pier. Despite libellant's knowledge that he was in the vicinity of the pier, he proceeded ahead, reducing the speed of his boat only from 15 to 16 miles per hour to 12 to 14 miles per hour. He looked for the light on the pier, but despite the facts that he did not see it and that, as he testified, he knew he was in a situation requiring the utmost care, he proceeded at this same rate of speed until he first discovered the pier 20 feet ahead of him, when he swerved his boat, too late to avoid a collision.

9. Libellant failed to exercise ordinary care under all of the circumstances prevailing, and such negligence proximately contributed to the loss of his boat and the death of his wife.

10. The negligence of both the libellant and the respondent jointly contributed directly to the loss of libellant's boat and the death of libellant's wife.

11. The fair and reasonable value of libellant's boat at the time of its loss, under the only evidence introduced, was $5,000.00.

12. This action to recover damages for the death of libellant's wife is brought by libellant as the personal representative of the decedent to recover the pecuniary loss suffered by libellant, and James E. Boast, her adult son, who together are the only surviving next of kin of the decedent. No evidence was offered tending to prove that James E. Boast suffered any pecuniary loss on account of the death of libellant's wife and it is, therefore, found that no such loss was suffered. No finding is made as to the pecuniary loss, if any, suffered by libellant on account of the death of his wife because it is found that libellant cannot recover therefor on other grounds.

CONCLUSIONS OF LAW.

1. The right to recover damages by or on behalf of the libellant on account of the death of libellant's wife is governed and controlled by the law of the State of Ohio, and under said law libellant's own negligence proximately contributing to such death is a complete bar to any such recovery.

2. The right of libellant to recover damages for the loss of his boat is governed and controlled by Admiralty Law, under which the rule of division of damages is applied and, therefore, under the foregoing findings of fact, libellant is entitled to recover $2,500.00 damages for the loss of his boat.

3. Libellant shall have judgment against respondent in the amount of $2,500.00, together with interest from the date of said judgment, and one-half of the costs of this action.

JONES,

United States District Judge.

February 17, 1956.

MEMORANDUM OF THE DISTRICT COURT ON MOTION FOR NEW TRIAL OR REVERSAL OF DECREE AND ASSESSMENT OF DAMAGES.

(Filed April 2, 1956.)

JONES, *J.*:

Libellant cites the cases of *Cox v. Roth*, 348 U. S. 207 (1955), *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953) and *O'Leary v. United States Line Co.*, 215 F. 2d 708 (C. A. 1, 1954) as the basis of his motion for new trial or reversal of decree and assessment of damages.

The decisions in the cases above advanced as authority by the libellant, deal with maritime torts;—that is, a right of recovery rooted in maritime law. Here we deal with a state created right (wrongful death); Federal maritime law provided no recovery for wrongful death.

There is no disagreement with the cited cases holding that federal substantive law must be applied to a cause of action rooted in federal maritime law.

In this case the cause of action is not rooted in federal maritime law, but is a state created cause of action to which the state substantive law is applied. See an excellent exposition of this question in Judge Hartigan's dissenting opinion in *O'Leary v. United States Line Company*, 215 F. 2d 708 at pages 713-14-15.

In this view of the matter the motion must be denied.

JONES,

United States District Judge.

April 2, 1956.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 1, 1957.)

Before SIMONS, Chief Judge, ALLEN and STEPHENS,* Circuit Judges.

ALLEN, Circuit Judge. This appeal arises out of a libel instituted against defendant for wrongful death of libellant's wife and for damage to libellant's motor boat alleged to have been caused by the negligence of respondent in creating a hazard to navigation by extending a pier over 1,200 feet into Lake Erie without adequate lighting.[1] The findings of fact of the District Court, which the parties stipulate are true and accurate, are printed in the margin.[2]

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* Albert Lee Stephens of the Ninth Circuit.

[1] The parties will be designated as in the court below.

[2] 1. On October 3, 1953, at about 10:00 o'clock P. M. a 28-foot Gar Wood type motor boat, owned and operated by libellant, collided with a nearly completed pier which was being built for respondent in the navigable waters of Lake Erie near Eastlake, Ohio, which collision resulted in the death of libellant's wife, Dorothy Niepert, and the sinking and complete loss and destruction of libellant's said boat.

2. The pier extended from the shore into the waters of Lake Erie a distance of 1,200 to 1,300 feet, and projected from six to seven feet above the surface of said waters, thereby constituting an obstruction and hazard to navigation, especially to small craft such as libellant's boat.

3. At the time of the collision the pier was nearly completed. The construction was being done for respondent by the Great Lakes Dredge & Dock Company. Permanent lighting for the pier was included in the construction plans and had been approved by the United States Coast Guard, but at the time the collision occurred its installation had not been completed.

4. At the time of the collision the lighting on the pier consisted of a temporary light of a type supplied and approved by the contractor, located on a pole at the end of the pier. While the United States Coast Guard did not recommend any certain type of light for temporary lighting, it did require that such a light be

(Continued on following page)

The District Court held that the rule of division of damages which controls in admiralty cases, 46 U. S. C. Section 766, was applicable to the loss of respondent's motor boat. The court found the value of the boat to be $5,000 and gave judgment for libellant for $2,500. However, the right to recover for the death of libellant's wife was denied upon the ground that respondent was guilty of contributory negligence in that with full knowledge of the existence of the pier and its position in Lake Erie he failed to check his speed in approaching the pier. The court denied recovery upon this phase of the case for the reason that the Ohio rule of contributory negligence was applicable and therefore the action was barred. *Purdy v. Kerentoff*, 152 O. S. 391, 396.

(Continued from preceding page)

visible from all essential horizons. The light provided was not visible from all essential horizons.

5. Under all of the circumstances the temporary lighting provided on the pier was not adequate. The failure of the respondent adequately to light the pier, while neither wilful, reckless, nor wanton, did constitute a breach of duty, or fault, upon the part of respondent which proximately brought about the accident and the consequent death of the libellant's wife.

6. On the night of the collision the Lake was calm, but the night was very dark. There was no mist, fog or other similar obstruction to visibility.

7. Prior to the time of the collision libellant knew of the existence and approximate location of the pier. He had made four trips past the pier before the day of the collision, at least once at night and three times in the daytime. He had passed by the pier twice in the afternoon of the day of the accident. Libellant also knew that respondent maintained a power plant on the shore from which the pier jutted out into the water.

8. Libellant was an experienced amateur lake boatsman with 25 years' experience in operating small boats on Lake Erie. As he approached the vicinity of the pier libellant and Wick, a passenger in the boat, saw the lights of respondent's power plant on the shore, knew they were in the vicinity of the pier, and discussed its probable location. They also discussed the lights from a barge which Wick had on all previous occasions seen east of the pier.

The sole question presented is whether the District Court erred in applying Ohio substantive law in an admiralty proceeding. The court concluded that the right of recovery for wrongful death was a state-created right and not a right rooted in maritime law and that therefore the state substantive law controlled. The libellant, while conceding that the remedy supplied by a state wrongful death statute may be borrowed by a federal court in an admiralty proceeding, contends that only the remedy may be borrowed and not the substantive common law of the state. He urges that the Ohio common-law rule that a finding of contributory negligence bars libellant's claim herein cannot prevail over the admiralty rule of comparative damages. In support of this contention he cites hold-

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Despite libellant's knowledge that he was in the vicinity of the pier, he proceeded ahead, reducing the speed of his boat only from 15 to 16 miles per hour to 12 to 14 miles per hour. He looked for the light on the pier, but despite the facts that he did not see it and that, as he testified, he knew he was in a situation requiring the utmost care, he proceeded at this same rate of speed until he first discovered the pier 20 feet ahead of him, when he swerved his boat, too late to avoid a collision.

9. Libellant failed to exercise ordinary care under all of the circumstances prevailing, and such negligence proximately contributed to the loss of his boat and the death of his wife.

10. The negligence of both the libellant and the respondent jointly contributed directly to the loss of libellant's boat and the death of libellant's wife.

11. The fair and reasonable value of libellant's boat at the time of its loss, under the only evidence introduced, was $5,000.00.

12. This action to recover damages for the death of libellant's wife is brought by libellant as the personal representative of the decedent to recover the pecuniary loss suffered by libellant, and James E. Boast, her adult son, who together are the only surviving next of kin of the decedent. No evidence was offered tending to prove that James E. Boast suffered any pecuniary loss on account of the death of libellant's wife and it is, therefore, found that no such loss was suffered. No finding is made as to the pecuniary loss, if any, suffered by libellant on account of the death of his wife because it is found that libellant cannot recover therefor on other grounds.

ings of the Supreme Court of the United States in cases not involving wrongful death, in which the admiralty rule of division of damages is approved and stressed. Cf. *The Max Morris*, 137 U. S. 1, 14, 15; *Pope & Talbot, Inc., v. Hawn*, 346 U. S. 406. The following language in the *Pope & Talbot* case, libellant contends, requires reversal:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

This argument is premised upon the assumption that libellant is deprived here of substantial admiralty rights as defined by Congress or by the Supreme Court of the United States. We think the instant case does not involve such a deprivation.

The Supreme Court has repeatedly held that the maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199, 213; *Western Fuel Co. v. Garcia*, 257 U. S. 233, 240; *Levinson v. Deupree*, 345 U. S. 648, announced in 1953. In order to provide a remedy for wrongful death on the high seas, in 1920 Congress enacted such legislation covering the high seas, 46 U. S. C. Section 761. This statute expressly excluded an action for wrongful death within a league from the shore of any state. The instant case arose within a league from the shore line of Lake Erie. While 46 U. S. C., Chapter 21, provides, in accordance with the general maritime law, that contributory negligence shall not bar recovery but shall only mitigate damages (46 U. S. C. Section 766), Section 767 of the same statute excludes the Great Lakes. It reads as follows:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall

not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

The exclusion thus expressly covers both the action and the remedy, including the provisions as to comparative damages. Senate Report No. 216 of Senate Reports, Vol. 1, Miscellaneous, stated the purpose of this enactment as follows:

> "The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty, both in rem and in personam. The right is made exclusive for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States."

That part of Lake Erie upon which the accident occurred is within the territorial jurisdiction of the State of Ohio. 5 U. S. Statutes at Large 49; *Edson v. Crangle*, 62 O. S. 49.

The debates on the subject in Congress, including Reports of the Senate and House Committees on the Judiciary (66th Congress, Second Session, 1919-1920, Senate Reports Volume 1, Miscellaneous, Report No. 674), together with statements made by the Chairman and members of the Judiciary Committee of the House, at the time of the passage of 46 U. S. C., Chapter 21, Congressional Record, Volume 59, Part 5, 66th Congress, Second Session, conclusively show that as to wrongful death on the Great Lakes the situation was to remain unchanged. The cause of action for death or the right to recover for death was to be pleaded under the state statutes.

It is true, as pointed out by this Court in *Pioneer Steamship Company v. Walter E. Hill*, 227 Fed. (2d) 262,

263, that the class of workers who may avail themselves of the admiralty doctrine of seaworthiness in cases of maritime tort not resulting in death has been broadened. *Pope & Talbot, Inc., v. Hawn, supra*, 412. In that case a carpenter employed by an independent contractor and in no sense a seaman, who was working on a ship berthed on navigable waters, was held not to be barred by contributory negligence and to be entitled to recover under the comparative damages rule of admiralty. But this doctrine does not extend to a wrongful death action occurring on one of the Great Lakes so as to eliminate substantive state law retained by the Congress as applicable in such cases.

If we read *Pope & Talbot, Inc., v. Hawn, supra*, correctly, it does not require the lower courts, against the deliberate enactment of the Congress, to apply the admiralty rule of contributory negligence in an accident occurring on waters from which Congress expressly excluded both the right and the remedy for wrongful death provided for the high seas in 46 U. S. C. Chapter 21. The case of *Cox v. Roth*, 348 U. S. 207, relied on by libellant does not affect this view. It did not overrule the prior decisions such as *Western Fuel Company v. Garcia, supra*, with reference to the wrongful death action nor supersede the statutes of Congress pertaining thereto. The principal question presented in the case was whether an action under the Jones Act, 46 U. S. C. Section 688, survives the death of a tort-feasor. The *Cox* case was not predicated upon any state statute and, since the Supreme Court had before it no question of a state-created right, we think it has no bearing here.

Since the right of recovery for wrongful death occurring on the Great Lakes was created by state law and not by Congressional legislation or by court decision, the District Court correctly held that substantive defenses

existing under state law, such as contributory negligence, applied. This is the law long established in this Court. *Robinson v. Detroit &c. Steam Navigation Company*, 73 Fed. 883; *Feige v. Hurley*, 89 Fed. (2d) 575; *Hutchinson v. Dickie*, 162 Fed. (2d) 103, 108; *Louise Lee v. Pure Oil Company*, 218 Fed. (2d) 711, 714. The decisions in *Pioneer Steamship Company v. Walter E. Hill, supra*, and *Imperial Oil, Limited, v. Frank Drlik*, 234 Fed. (2d) 4, did not involve wrongful death actions based upon state statutes. In each case a maritime tort was presented and the state law did not apply.

In accordance with our conclusion herein is *Levinson v. Deupree, supra*, in which the Supreme Court, affirming a decision of this Court in 199 Fed. (2d) 760, held that the admiralty court in enforcing a state statute giving a cause of action for wrongful death must look to the local law for its substantive rules. The common-law defense of contributory negligence, having become part of the Ohio substantive law with reference to wrongful death, was rightly applied by the District Court.

The judgment of the District Court is affirmed.

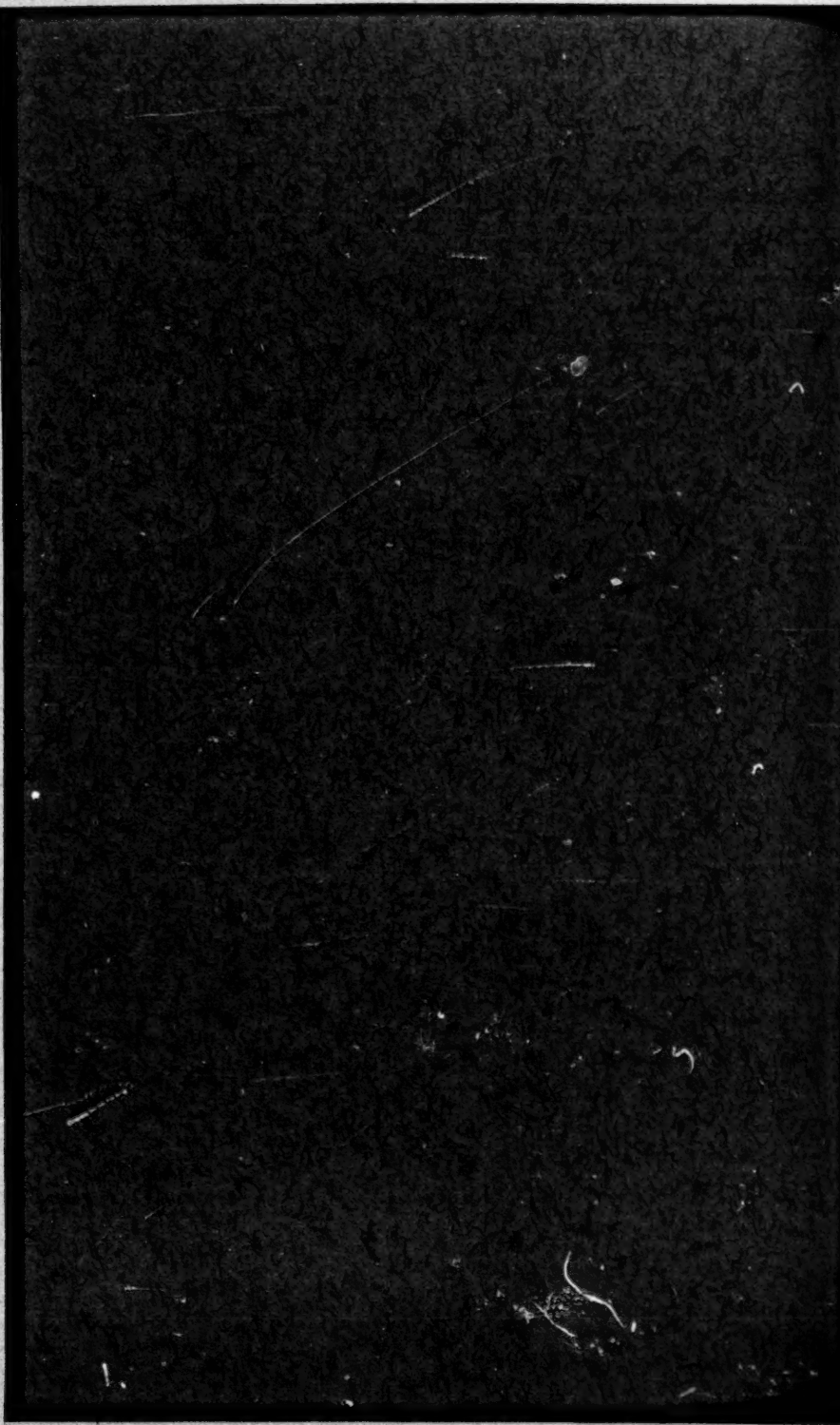
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 1, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.



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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 947.

CARL NIEPERT,
an Individual and as Executor of the Estate of
Dorothy Niepert, Deceased,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

COUNTER-STATEMENT OF QUESTION PRESENTED.

There being *no* Federal Admiralty right of recovery for wrongful death occurring on the Great Lakes within the territorial limits of Ohio, must the Federal Admiralty Court in affording another forum (with the Ohio state courts) for the enforcement of the *state created* right of recovery for wrongful death under the Ohio Wrongful Death Act, since the accident occurred on navigable waters, apply the same substantive rules of contributory negligence that prevail in the Ohio courts in actions under the Ohio statute?

THE OPINIONS OF THE COURTS BELOW.

Petitioner's wife was drowned when petitioner rammed the boat, which he was piloting, and in which his wife was a passenger, against the pier of respondent just off the shores of Lake Erie within the territorial limits of Ohio. It was stipulated before the Court of Appeals that the trial judge's finding that petitioner was guilty of contributory negligence proximately contributing to the death of his wife was "true and accurate and without error."

The sole issue before the Court of Appeals for the Sixth Circuit was whether this negligence of the petitioner, which would have concededly barred any recovery by him in the Ohio courts if he had brought his action in the state court, should likewise bar his recovery in the Federal Admiralty Court where he had chosen to file his action. The Federal Admiralty Court in this case afforded a forum along with the state courts, for the enforcement of the Ohio Wrongful Death Statute. This was solely because the accident occurred on navigable waters, and not because any admiralty right of recovery was being recognized.

The Sixth Circuit, following the explicit and consistent decisions of this Court since 1886, its own previous decisions since 1896 and the concurring decisions of the Second, Third, Fourth and Fifth Circuits, held that there was no general, inherent admiralty right of recovery for wrongful death even when occurring on navigable waters, and no federal statute creating such an admiralty right of action for death occurring on the Great Lakes in territorial waters of the State of Ohio. And since the rights sought to be enforced, as this uniform body of admiralty federal decisions has long established, arose *exclusively* from *state* law, it must be measured by the *substantive law of the state* creating the right of recovery.

Since the contributory negligence of the petitioner would have barred his recovery if he had brought this action in the Ohio courts, it barred his recovery in the Federal Admiralty Court. The mere fact that the admiralty court would provide a concurrent forum with the state courts for the enforcement of the *state created right of recovery* was no basis for applying, as petitioner contended, the rule of comparative negligence usually applied by the admiralty court when enforcing *a right created by the admiralty or maritime law.*

ARGUMENT.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT IN O'LEARY v. UNITED STATES LINES AND IS CONSISTENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT AND WITH DECISIONS OF THE SECOND, THIRD, FOURTH AND FIFTH CIRCUITS.

As the first reason for granting the writ, petitioner asserts that the decision below is in conflict with the decision of the Court of Appeals for the First Circuit in *O'Leary v. U. S. Lines Company,* 215 Fed. 2d 708 (1954), cert. denied 348 U. S. 939 (1955).

A. The decision below is consistent with the decision in O'Leary v. U. S. Lines and the dicta therein relied on by petitioner was expressly repudiated by the Fifth Circuit in Byrd v. Napoleon Avenue Ferry Company, 227 Fed. 2d 958, certiorari denied May 1956, 351 U. S. 925.

The *O'Leary* case was an action for wrongful death occurring on navigable waters brought in the admiralty court in Massachusetts under the Massachusetts Wrongful Death Act. Judgment was rendered against the plaintiff

by the trial court and this was affirmed on the grounds that *no negligence by the defendant had been established.* For its *decision*, therefore, it was not necessary for the court to determine whether to apply the admiralty or Massachusetts rule to the asserted contributory negligence of the plaintiff's decedent.

It is true that in the course of his opinion Judge Woodbury (Judge Hartigan dissented) discussed the effect of contributory negligence in an action for wrongful death brought in the admiralty court but predicated upon a state statute. He suggested that it seemed "incongruous" to have the law of comparative negligence applied to actions of the personal representative for the personal injury and suffering of the decedent, being an admiralty right of recovery, but to apply to the Wrongful Death action the state contributory negligence doctrine as an absolute bar to recovery.

Judge Woodbury well recognized, however, that this expression was no more than dicta:

> "In this case, however, we do not, and *indeed we cannot except by dictum, pass upon the question of the law applicable to count one.* The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonably be made under *either* local or maritime law. Wherefore *we do not reach the question of contributory negligence* wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages." (p. 712; emphasis supplied.)

Judge Hartigan in his dissent pointed out that just as severe incongruities would result from applying the admiralty doctrine of comparative negligence to the wrong-

ful death action created by the state statute as exist under the present practice:

> "Finally, in terms of incongruities, if, as the majority opinion suggests, general maritime law determines the liability and state law determines the remedy, then parties asserting rights under a state wrongful death statute arising from a maritime tort may obtain preferential treatment as compared with those asserting rights under the same statute because of a non-maritime tort. See Stevens, Erie R. R. v. Tompkins and The Uniform General Maritime Law, 64 Harv. L. Rev. 246, 266 (1950)." (pp. 714-715)

Furthermore, the incongruity to which Judge Woodbury referred in the *O'Leary* case is a type of incongruity which the courts have long recognized and accepted. As noted by this Court in *Just v. Chambers*, 312 U. S. 383 (1940), "there are numerous instances in which the general maritime law has been modified or supplemented by state action." (p. 388) Indeed, the court made specific reference (pp. 389-390) to "the many [eleven in fact] instances in which state action had created new rights, recognized and enforced in admiralty" according to the state law, which were set forth in the *City of Norwalk*, 55 Fed. at 106.

The most recent application, other than the instant case, of the well-established admiralty doctrine that where the admiralty court is enforcing a state created right of action for wrongful death, the admiralty court applies the substantive law of the state which created the right of recovery is *Byrd v. Napoleon Avenue Ferry Company*, 227 Fed. 2d 958, cert. denied, 351 U. S. 925. In that case the Fifth Circuit, adopting the opinion of the District Court, 125 Fed. Supp. 573, referred to the expression of opinion of the two judges of the First Circuit in the

O'Leary case, but expressly repudiated it. (125 Fed. Supp. at pp. 577-578) After a careful analysis of the decisions of this Court, and of the uniform jurisprudence in the Circuit Courts, it was there concluded:

> "It is this court's conclusion, therefore, that the right to recover for maritime tort not involving death and occurring within the borders of a state is governed by the general maritime law, *and the right to recover under a state wrongful death statute for a maritime tort is governed by the law of the state.*" (p. 578; emphasis supplied)

This Court did not consider it necessary to grant certiorari to review this decision which applied the very principles disputed by the petitioner here. 351 U. S. 925.

B. The prior decisions of the Sixth Circuit and decisions of the Second, Third, Fourth and Fifth Circuits have all uniformly applied the same rule as applied in the decision below.

For over seventy years the United States Circuit Courts have been applying the principle applied in the decision below, and have done so specifically to instances where the defense of contributory negligence has been raised in wrongful death actions in the admiralty court. Without exception these courts have held that it is the substantive law of the state as to the effect of this contributory negligence that is to be applied, and not the admiralty rules applied in actions where the right of recovery is granted by the admiralty law.

The prior decisions of the Sixth Circuit were *Robinson v. Detroit & C. Steam Nav. Co.*, 73 Fed. 883 (1896); *Feige v. Hurley*, 89 Fed. 2d 575 (1937); *Hutchinson v. Dickie*, 162 Fed. 2d 103 (1947); *Lee v. Pure Oil Company*, 218 Fed. 2d 711 (1955).

Uniformly the same rule has been followed in other circuits: *Puleo v. H. E. Moss & Co.*, 159 Fed. 2d 842, 845 (C. C. A. 2, 1947, cert. denied 331 U. S. 847); *Klingseisen v. Costanzo Transportation Company*, 101 Fed. 2d 902 (C. C. A. 3, 1939); *Continental Casualty Co. v. Skou*, 200 Fed. 2d 246 (C. C. A. 4, 1952, cert. denied 345 U. S. 992); *Quinette v. Bisso*, 136 Fed. 825, 838 (C. C. A. 5, 1905, cert. denied, 199 U. S. 606); *Graham v. Lusi*, 206 Fed. 2d 233 (C. C. A. 5, 1953).

II. THE QUESTION OF FEDERAL LAW INVOLVED HERE HAS BEEN SETTLED BY THE UNITED STATES SUPREME COURT FOR OVER SEVENTY YEARS SINCE THE HARRISBURG, 119 U. S. 199 (1886), AND MOST RECENTLY REAFFIRMED IN LEVINSON v. DEUPREE, 345 U. S. 648 (1953).

The issue in this case is not, as petitioner contends, a question of federal law, which has never been settled by this Court.

As early as *The Harrisburg*, 119 U. S. 199 (1886), it was established that no action for wrongful death "will lie in the courts of the United States under the general maritime law." (p. 213)

This Court held, however, in that decision, that the admiralty court would provide a forum to enforce the state created right of action for wrongful death where the accident happened upon navigable waters, but at the same time stated categorically that "if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence" by the state creating the right of action. (p. 214) Therefore, it was held in that case that the admiralty court could not apply any federal or admiralty statutes of limitation but must apply the *state statute* of limitations.

Just four years ago in *Levinson v. Deupree*, 345 U. S. 648 (1953), this Court stated, without equivocation, as it has repeatedly since 1886: "The maritime law does not allow recovery for wrongful death." (p. 650)

In that decision this Court, affirming a decision of the Sixth Circuit in 199 Fed. 2d 760, held that only where "procedural niceties," such as amendments to libels were involved, could the admiralty court apply admiralty jurisprudence, and not the substantive law of the state in a wrongful death action based upon a state statute.

The Court, reaffirming its earlier decisions, emphasized that the admiralty court, in enforcing a state wrongful death statute, is simply a "forum provided by another jurisdiction" and "such forum must look to the local law" for its *substantive* rules, although it should not do so for its *procedural* rules. The admiralty court could only enforce "the limited scope given to the right by the local law which created it." (p. 651) This Court stated the basis upon which the admiralty court enforces the state wrongful death statute:

> "In the absence of congressional action, the court adopted and enforced the obligation created by Kentucky as it would one originating in any foreign jurisdiction * * * *And it was bound to enforce it as it found it* * * *." (pp. 651, 652; emphasis supplied.)

That there is no admiralty right of recovery for wrongful death has been time upon time reasserted by this Court: *The Alaska*, 130 U. S. 201, 209 (1888); *Butler v. Boston and Savannah Steamship Company*, 130 U. S. 527, 555 (1889); *The Corsair*, 145 U. S. 335, 344 (1891); *The Albert Dunlors*, 177 U. S. 240, 259 (1899); *La-Bourgogne*, 210 U. S. 95, 139 (1907); *Lindgren v. United States*, 281 U. S. 38, 47 (1920); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 381 (1932).

And this Court has held in a long array of decisions between *The Harrisburg* and *Levinson v. Deupree* that the admiralty court, permitted as it is to enforce the state created right of action for wrongful death, must, however, enforce it as it would be enforced in the state courts in which the right was created: *The Corsair*, 145 U. S. 335 (1891); *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921); *Just v. Chambers*, 312 U. S. 383, 388 (1940); *Garrett v. Moore-McCormack*, 317 U. S. 239, 245 (1942).

III. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The decision below is not in conflict with Pope & Talbot v. Hawn.

Petitioner asserts that *Pope & Talbot v. Hawn*, 346 U. S. 406 (1953), establishes the doctrine that in *any case* in which admiralty jurisdiction is invoked, even though only to enforce a state created right of action, the general admiralty jurisprudence, including the rule of comparative negligence, is to be applied.

Pope & Talbot was not, however, a wrongful death case, nor a case predicated on a *state created right of recovery*. It was an action to enforce an *admiralty right of recovery* by a carpenter for injuries sustained while working on a ship berthed in navigable waters in Pennsylvania. This Court emphasized that the claim was not one based upon any state statute or right of action, but was a right of recovery based upon federal maritime law:

> "And Hawn's complaint asserted no claim *created by or arising out of Pennsylvania law*. His right of recovery for unseaworthiness and negligence is *rooted in federal maritime law*." (p. 409; emphasis supplied.)

Being an admiralty right of action, the admiralty rule of comparative negligence applied. This Court has re-

peatedly held, however, as established in the cases cited above, that there is *no* admiralty right of action for wrongful death. Unlike the claim in *Pope & Talbot*, the claim for wrongful death of the petitioner here was "created by or arising out of" the statutes of Ohio.

It was expressly held in *Byrd v. Napoleon Avenue Ferry Company*, 125 Fed. Supp. 573 (D. C. La., 1954), which was affirmed by the Fifth Circuit on the opinion of the District Court, 227 Fed. 2d 958 and Certiorari denied by this Court last year, 351 U. S. 925, that *Pope & Talbot* did not change the long established rule that in enforcing the state wrongful death statutes, the admiralty court applies the substantive rules of the state in which the right was created.

The court pointed out that Mr. Justice Black, who authored the opinion in *Pope & Talbot*, was also the author of the statement in *Garrett v. Moore-McCormack*, 317 U. S. 239 (1942), that "admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state." (p. 245)

As authority for this position, Mr. Justice Black had cited *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921), in which this Court had again reaffirmed its earlier position that there was no admiralty right of action for wrongful death, and that the admiralty court while it could afford a forum for the enforcement of a state created right of action for wrongful death occurring on navigable waters had to apply the state substantive law.

It should be noted here that in *Western Fuel Company v. Garcia* the same arguments (257 U. S. at 236) based on the so-called "savings clause" (28 U. S. C. A. 1333) and of the supposed necessity of "uniformity" in

admiralty administration were advanced as urged by the petitioner here, and on the authority of the same cases, such as, *Southern Pacific Company v. Jensen*, 244 U. S. 205 (1916) and *Knickerbocker Ice Company v. Stewart*, 253 U. S. 149 (1920). The acceptance of state substantive law in enforcing the state civil action right of recovery for wrongful death, it was held, however, was not inconsistent with the "savings clause" or these decisions. (257 U. S. at 241-243) And, as was stated in *Standard Dredging Corporation v. Murphy*, 319 U. S. 306 (1942), "Indeed, the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." (p. 309)

B. The decision below is not in conflict with Cox v. Roth.

Petitioner contends that *Cox v. Roth*, 348 U. S. 207 (1955) "is also in point" in support of petitioner's claim that the Sixth Circuit erred in the decision below. The fact is, however, that *Cox v. Roth* was not an action predicated upon any state statute as is the instant case. It was an action for the wrongful death of a seaman, brought under the express terms of the Federal Jones Act, 46 U. S. C. A. 688, against the estate of the deceased tortfeasor. As established by this Court in its first sentence of the opinion: "The main question presented in this case is whether an action *under the Jones Act* survives the death of the tortfeasor." (p. 207; emphasis supplied.)

That this Court in *Cox v. Roth* was not in any way intending to express any opinion in regard to the long established rule that there is no admiralty action for wrongful death, and that the admiralty court in enforcing the state created right of action for wrongful death must apply the state substantive law is clearly evidenced by its

failure even *to cite a single one* of the long array of cases in which this Court has unequivocally set forth these principles. Yet, the petitioner would have it that *Cox v. Roth* overrules them all. The plain fact is, as the Court below correctly concluded, *Cox v. Roth* has no application at all to the instant case.

CONCLUSION.

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

JAMES C. DAVIS,
GEORGE I. MEISEL,
Counsel for Respondent.

LEE C. HOWLEY,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.